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No. 353

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

KOHLER CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

Respondents.

BRIEF AMICUS CURIAE OF WISCONSIN MANUFACTURERS' ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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With consent of the parties, the Wisconsin Manufacturers' Association respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Interest of Amicus Curiae.

The Wisconsin Manufacturers' Association (WMA) is a voluntary association of manufacturing enterprises with operations in Wisconsin. It was founded in 1911 and is now constituted of over 1300 member-enterprises employing over 375,000 people (almost 85%) engaged in manufacturing. The average number of employees per member of the association is under 100.

Since its founding, WMA has represented Wisconsin industries in obtaining equitable rail, air, mail and shipping rates, fair consideration on unemployment and workmen's compensation, taxes, wage and hour and labor-management legislation.

Its interest in the petition *sub judice* stems not only from the natural interest invoked by reason of a member petitioner (Company), but from its long time interest in labor-management affairs, and especially in the promotion of lawful and peaceful settlements to disputes. The strike which befell Petitioner frequently has been the object of sensation-seekings writers' and commentators' efforts—always with mention of Wisconsin industry. The WMA's interest here is to assist in righting two errors in the administration of the National Labor Relations Act which have become manifest in these long proceedings. The effect of such errors, if allowed to stand, will be so far-reaching that the attendant evil will undoubtedly cause a regression in the peaceful resolution of management-labor disputes for years to come.

After a long hearing and review, the Board originally held that striking Kohler employees who were guilty of violent and unlawful activities attendant to the strike were not entitled to reinstatement with back pay upon their offer to return to work, although in the same proceedings the Company was found to have committed violations of §§8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 USC §151 *et seq.*). 128 NLRB 1062 (1960); J.A. p. 8.

Upon a petition for review to the Court of Appeals for the District of Columbia, the lower court, (Judge Miller dissenting), remanded the matter to the Board with a direct instruction to reweigh the evidence and inferences to be drawn; apply the doctrine of *NLRB* v. *Thayer Co.*, 213 F.(2) 748 (CA.1, 1954), *cert. den.*, 348 U.S. 883, as therein interpreted; and revise its decision accordingly. 300 F.(2) 699 (CADC, 1962); Supp. J.A. pp. 2318 *et seq.*

With new majority personnel constituting the Board, a supplemental decision was then issued by the Board reversing its prior decision and now holding: (a) the strike was an unfair labor practice strike from the outset, and (b) upon balancing the strikers' violent and unlawful activities against the Company's conduct, the 57 strikers were entitled to an offer of reinstatement. 148 NLRB No. 147; Supp. J. A. p. 2339, *et seq.*

Again upon review, the lower court affirmed the Board's Supplemental Decision *per curiam;* Judge Miller again dissenting. App. A to Pet., 58 LRRM 2847.

The Petition for a Writ of Certiorari was filed July 16, 1965, presenting two questions:

1. Did the National Labor Relations Board exceed its authority and the limitations imposed upon it by Sec-

tion 10(c) of the Act in holding that strikers discharged for coercive conduct proscribed by the Act were engaged in an unfair labor practice strike and are entitled to reinstatement with back pay; applying a policy of "balancing" the strikers' illegal conduct against the employer's conduct?

2. May a reviewing court, which has no power to substitute its judgment for that of the Board as to inferences to be drawn from the evidence, nevertheless conclude that the Board "improperly ignored the inferences to be drawn" from evidence which the Board considered and found was "amply refuted" by other evidence—and remand the case to the Board with directions to reweigh the evidence?

This *amicus curiae* brief is addressed to both questions and emphasizes what it considers the errors in the record below from the objective views of industry in general, rather than the partisan views of the parties litigant.

ARGUMENT

A. Status of the Law.

From the earliest development of decisional law under the Wagner Act (49 Stat. 449), a dichotomy of results has been pronounced grounded upon the keystone question as to whether a strike by employees of an employer was for the purpose of (a) enforcing their economic demands, or (b) redressing unfair labor practices alleged to have been committed by the employer. Depending upon a determination of the subjective *raison d'etre,* strikers for the former purpose became known as economic strikers on an economic strike, and the latter, unfair labor practice strikers on an unfair labor practice strike.

Consistent with the legislative purpose in 1935 (and at least in this respect, ever since), an economic striker on an economic strike, upon the settlement of the bargainable issues, returned to his job (as if he had never been on strike), unless he had been permanently replaced during the strike by a new employee. *NLRB* v. *Mackay R. & T. Co.,* 304 U.S. 333 (1938). In other words, the economic striker, by going on strike, risked permanent replacement in the interim as against a successful settlement of the strike. The personal gain of improved wages or working conditions was matched against the employer's ability to find workers in the market at the unimproved rates. Congressional recognition of the status of an economic striker was incorporated into the Act itself in 1959 by the amendments made to §9(c)(3), P.L. 86-257, §702; 29 USC §159(c)(3).

On the other hand, the unfair labor practice striker on an unfair labor practice strike had a superior status to that of the economic striker, for he was said to be effectuating the policies which Congress had adopted to the end that labor-management disputes might be peaceably settled and obstructions to interstate commerce removed. Consequently, even if permanently replaced by a new employee while he was on strike, the unfair labor practice striker was entitled to return to his former employment undiminuted upon his offer to do so, because he was not to be penalized for the action he had taken *pro publico bono. Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270 (1956); *NLRB* v. *Mackay R. & T. Co., supra.*

But the question soon arose as to the reinstatement rights of the unfair labor practice striker who tarnished his shining armor by committing illegal acts while on strike. At an early date this Court commenced a sound decisional line in the public interest which held that even where the strike commenced because of an employer's unfair labor practices, a striking employee would be denied reinstatement to his former employment undiminuted upon his offer to return if he was directly or indirectly responsible for seizing and holding the employer's property, violence, wanton and generally uncivil and undefensible activities,[1] and activities which in no event are "protected activities" under §7 of the Act.[2]

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[1] *NLRB* v. *Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939) (employer guilty of interference campaigning for "Company" union, surveillance and refusing to bargain with a majority representative); *NLRB* v. *IBEW,* 346 U.S. 464 (1953) (permanent damage to employer's public image, financial and public relations; extreme disloyalty to employer).

[2] *NLRB* v. *Washington Aluminum Co.,* 370 U.S. 9 (1962).

In *Fansteel* it was urged, as here, that the employer's unfair labor practices constituted sufficient provocation and that the strikers were thereby justified in their illegality. Chief Justice Hughes stopped this argument a-borning:

> "To justify such conduct because of the existence of a labor dispute or of an unfair practice would be to put a premium on resort to force instead of legal principles of law and order which lie at the foundations of society. . . . We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work." *Id*, at pp. 253-255.

Following *Fansteel* and perhaps taking a cue from the dissent of Mr. Justice Reed therein, it was suggested by one writer that the Board and courts should weigh the strikers' misconduct against the provocation furnished by the employer's unfair labor practices before denying reinstatement. See, 52 Harv.L.Rev., 1275, 1326 (1939). This suggestion was criticized by Judge Clark in *McNeely & P. Co.* v. *NLRB*, 106 F.(2) 878, 881 (CA 3, 1939):

> ". . . such latitude of interpretation gives the courts what amounts to legislative power. Maybe they are better qualified to exercise it. It just happens that the draftsmen of our system of government thought not."

To make certain that legislative policy was clear on this point, Congress, in amending the Act in 1947, specifically added:

> "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of

any back pay, if such individual was suspended or discharged for cause." 61 Stat. 146; c.120, Title I, §101 (1947).[3]

This provision became an integral part of §10(c) of the Act as amended.

B. Error of Interpretation and Application of Thayer.

With this background, we come to the decision of the lower court herein to which the petition for the writ is addressed. There the court characterized the *Thayer* decision, *supra,* and in so doing made serious errors. The lower court said, pp. 702-703:

> "Thayer holds that where an employer who has committed unfair labor practices discharges employees for unprotected acts of misconduct, the Board must consider both the seriousness of the employer's unlawful acts and the seriousness of the employees' misconduct in determining whether reinstatement would effectuate the policies of the Act."

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[3] This amendment was preceded by a less sophisticated proposal which bluntly provided that those employees who engaged in violence would lose all rights under the Act. See, HR 3020, §12(d) as reported and passed by the House of Representatives. 1 Leg. Hist. of Labor-Management Relations Act 1947, pp. 80, 207. It is interesting to note that this provision was dropped by the House Conference Rept. 510, on H.R. 3020 upon the following consideration:

> "Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the Act and are subject to discharge without right of reinstatement. *The right of the employer to discharge an employee for any such reason is protected in specific terms in section* 10(c)." *Id.* p. 563 (emphasis ours)

This is *not* what *Thayer* holds, and a careful review of *Thayer* will show quite to the contrary. In *Thayer* the Court was reviewing a Board decision which had held *inter alia* that the strike was a protected activity within the meaning of §7 of the Act and that therefore, *ipso facto,* the dischargees should be reinstated. *Id.,* at p. 755. The reviewing court did not agree with this legal conclusion and said several times that the rationale of the Board based upon such a premise was erroneous. What *Thayer* then held was that the strike in general was not violent and, while illegal under state law, not illegal under federal law (*i.e.,* protected activity). *Id.,* at p. 756. But, most important, *Thayer* stands fast and consistent with *Fansteel* and the general broad decisional principle that those strikers who engaged in violence and coercive conduct calculated to instill the fear of bodily harm in non-strikers were *not* engaged in "protected activity," not weighable against anything (even "flagrant unfair labor practices"), and, *ipso facto,* not entitled to reinstatement.

Therefore, the first error of the court below is in stating that *Thayer* is directed to "unprotected acts *of misconduct.*" *Thayer* deals mainly in dictum with "unprotected acts" *of good conduct;* where misconduct was involved, reinstatement was denied. Nowhere does *Thayer* even intimate that employees discharged for "only engaging in or directing and controlling the mass picketing, for participating in the home demonstrations, for participating in the employment office picketing, or for combination of such activities"[4] were engaged in a "protected activity."

Secondly, the *Thayer* decision, if it stands at all, must be read in a manner consistent with this Court's pro-

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[4] 148 NLRB No. 147, at p. ....; Supp. J.A. at p. 2359.

nouncement on the same subject in *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). There, this Court held that a concerted, peaceful walkout in protest of working conditions was protected under §7 of the Act, and that—

> "The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent or in breach of contract . . . (or) indefensible. . . ." *Id,* at p. 17.

Thirdly, the majority of the court below in buttressing its inclination to apply its version of the *Thayer* decision cites *Berkshire Knitting Mills,* 46 NLRB 955 (1943), which Congress, during its consideration of the 1947 amendments to the Act, assumed had been overruled and abandoned. See, House Conference Rept. No. 510, on H. R. 3020; 1 Leg. History of the Labor Management Relations Act 1947, pp. 542-543.

Fourthly, even if it can be said that *Thayer* holds that an employee engaged in an unprotected activity can be reinstated solely by virtue of the Board's power to "effectuate the policies of the Act" and without regard to any other direction of the Act or mandate *de hors* the Act, it is submitted that such power could not rationally be exercised where, as here, reinstatement would (could not help but) condone, ratify, reward and approve violations of the policies of the Act.

C. The Principles of Judicial Review.

After directing the Board to apply the lower court's interpretation of *Thayer,* the lower court's majority decision appears to have proceeded to lay out a road map of what would be acceptable as a new set of fact findings upon further review. These new (possible) fact findings would apparently in the view of a majority of the lower court

constitute sufficient provocation by the Company to entitle violent strikers to reinstatement under a quasi-judicial weighing. It is submitted that the lower court exceeded its statutory jurisdiction and duty in this manner of review.

The Court's authority in a review of a Board order is limited:

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." §10(e) of the Act, 29 U.S.C. §160(e).

Obviously, this means the Courts of Appeals are not empowered to try a case *de novo* on review. *Osceola Cty. Co-op Creamery Ass'n.* v. *NLRB,* 251 F.(2) 62, 63 (CA 8, 1958); *Victor Mfg. & Gasket Co.* v. *NLRB,* 174 F.(2) 867, 868 (CA 7, 1949). A reviewing court in such case should give due consideration to the special qualifications and expertise of the Board. Only when the court cannot conscientiously find substantial evidence supporting the Board's decision may it set aside the Board decision. *NLRB* v. *Pacific Intermountain Exp. Co.,* 228 F.(2) 170, 171 (CA 8, 1955), *cert. den.* 351 U.S. 952. The court upon review is not permitted to weigh evidence, resolve conflicting inferences, or draw its own inferences from the evidence. *NLRB* v. *Nelson Mfg. Co.,* 326 F.(2) 397, 398 (CA 6, 1964). These propositions have been well established since *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951).

Measured against these principles, it is submitted that the lower court transcended the pale in that area of its opinion where it reviewed the facts and literally substituted its inferences therefrom for those of the Board. For example, the Board had found that any inference that the

Company's pre-1953 subjective attitudes constituted a continuing inference was dispelled and refuted by two successful negotiations with the Union. The lower court held that this inference was wrong and substituted the inference to the contrary based upon other evidentiary facts, *all of which are discussed somewhere in the Board's decision.* That the Board did not in its written decision specifically refer to every piece of evidence on every major and minor issue is not reason to say it was not considered. What the Board did here and should do in every case is to resolve issues of fact and draw supportable inferences therefrom.

Nor did the lower court fairly view the Board's decision when it said—

> "We conclude that . . . the Board improperly ignored the inferences to be drawn from Kohler's pre-1953 labor relations history in assessing its intent at the bargaining table in 1954." p. 706.

Plainly, the Board did not ignore the possibility of another inference. The court's own recitation from the Board decision so indicates. A trier of facts does not ignore one inference by inferring another. Where, as here, the Board had inferred one fact from a pattern of facts, the court cannot and should not substitute its own opposite inference from another pattern of facts—and especially where the other pattern of facts was established by the Board from evidence before it and, when weighed, was found insufficient to support the very inference which the reviewing court now substitutes.

The Board's choice of inferences to be drawn, like its determinations of raw facts from conflicting views, may not be set aside by a reviewing court even though the court might justifiably have made a different choice had the

matter been before it as the trier of facts in the first instance. *Martin Sprocket & Gear Co.* v. *NLRB,* 329 F.(2) 417 (CA 5, 1964); *NLRB* v. *Nelson Mfg. Co., supra; Nabors* v. *NLRB,* 323 F.(2) 686, 692 (CA 5, 1963), *cert. den.,* 376 U.S. 911; *NLRB* v. *Marcus Trucking Co.,* 286 F.(2) 583, 589 (CA 2, 1961); and cases cited therein. It is the function of the Board, not the court, to consider the relevant factors and to weigh and evaluate the evidence and draw inferences. If the Board does so and is supported by substantial evidence of record, no court is empowered to overturn its decision. *Dixie Bedding Mfg. Co.* v. *NLRB,* 268 F.(2) 901, 905 (CA 5, 1959); *Victor Mfg. & Gasket Co.* v. *NLRB, supra.*

CONCLUSION

The proceedings below should be reviewed for they establish a substantial departure from time-tested ground rules in the handling of labor-management disputes. No rational employer and no rational union relishes the prospect of a strike. No matter how short the duration, a strike almost certainly involves bitterness affecting morale, customer loss and personal hardship beyond the mere temporary loss of wages. To add to these personal tragedies the gamble that violence may go unpunished and in fact rewarded by a quasi-judicial immunity, is almost like substituting a game of Russian roulette for a legal framework for settlement. Certainty as to what is legal and what is illegal in a strike circumstance is most desirable and the only real hope that disputes will be settled within the framework of Congressional intent.

Here, the appellate court has seemingly departed (without citation) from the axiomatic rule that its inferences from facts cannot be substituted for those of the Board

so long as those of the Board are supported by substantial evidence of record. It is not even suggested by the lower court that the inferences drawn by the Board were not supportable. Regardless of its effect on the present parties litigant, the effect of this new rule of review must be to substantially increase the case load to come to the appellate courts for review from the NLRB. For years it had been thought that where either of two inferences were supportable, the one drawn by the Board would be irrefutable upon appeal. Now, every losing party before the Board will naturally conclude (on the basis of these proceedings) that an appeal is worthwhile because the appellate court may find the opposite inference "more supportable" or "more logical". This result is neither necessary nor is it in the interest of the Board, employers, unions or the judiciary. Heretofore, all parties knew and adhered to the rule on appellate review.

The petition of Kohler Co., it is submitted, should be granted as it raises in a judicially ripe situation an opportunity for this Court to announce definitive principles in the field of labor-management relations which will set firm guide lines inuring to the benefit of the entire country.

Respectfully submitted,

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